

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LIST INDUSTRIES, INC.,
v.
LARRY LIST,

Case No. 2:17-CV-2159 JCM (CWH)

ORDER

Defendant(s).

LARRY LIST,

Presently before the court is plaintiff List Industries Inc.’s *ex parte* motion for a temporary restraining order (TRO) (ECF No. 3) and *ex parte* motion for a preliminary injunction (ECF No. 4). Plaintiff requests this court to enjoin defendant Lawrence (Larry) List from “contacting, intimidating or otherwise interfering in any way with any employee, agent, representative, vendor, distributor, customer and potential vendor, distributor or customer of List Industries, and any of their subsidiaries, in any form or fashion, including, but not limited to, in person, by letter, e-mail, text, any social media and by telephone and/or fax, for any reason, pending the outcome of this action.” (ECF No. 3 at 1).

I. Facts

On August 11, 2017, plaintiff filed its complaint against defendant. (ECF No. 1).

On August 15, 2017 plaintiff filed the instant motions for a TRO and motion for a preliminary injunction. (ECF Nos. 3, 4). On the same day, plaintiff filed affidavits in support of the motions. (ECF Nos. 5, 6).

On August 23, 2017, plaintiff filed an affidavit of service indicating that plaintiff personally served defendant Lawrence (Larry) List the instant motions for a TRO and preliminary injunction.

1 on August 16, 2017. (ECF No. 9). Although defendant has notice of both motions, he has not
2 been heard on them.

3 The motions for a temporary restraining order and preliminary injunction (ECF Nos. 3, 4)
4 allege the following facts. Defendant Larry List is one of the grandsons of the founder of List
5 Industries and, at one point many years ago, owned shares in List Industries, but his interest was
6 repurchased in full. (ECF No. 3 at 2). “Sadly, [Larry’s brother] and the representatives of List
7 Industries are informed and believe that Larry has succumbed to a disease, most likely alcoholism,
8 and become increasingly hostile, obscene and threatening toward [his brother JR, the president of
9 List Industries], other representatives of List Industries and the vendors, distributors and customers
10 of the Company. . . . Larry clearly seeks to defame his brother and those who manage and work
11 for List Industries” *Id.* “List Industries has endured attacks from Larry since 2012, but even
12 proceedings in a lower court have not stopped his behavior.” *Id.* at 3. Larry has left “threatening
13 and obscene messages on List Industries’ counsel’s voicemail system, filled with threats, personal
14 insults, and profanity. *Id.* “Larry’s messages became so vile and personal that eventually Florida
15 counsel became concerned for the safety of his staff and implemented security precautions at this
16 office.” *Id.* “After a brief respite, by 2015, Larry’s threats, via e-mail and voice mail, were arriving
17 on the Company’s website and on its employees’ voice mails.” *Id.* List Industries, on behalf of
18 JR List (Larry’s brother) personally, obtained a temporary protective order (TPO) from the
19 Henderson Justice Court in Nevada, and notified the FBI. *Id.* “Despite the TPO, Larry’s harassing
20 phone calls and messages continued, specifically accusing List Industries of selling defective
21 lockers and performing substandard installations. . . . Larry went so far as leaving a threatening,
22 profanity laced message with J R Lists’s golf club and another obscene and insulting message with
23 a female representative of a Company client.” *Id.*

24 The motions continue, alleging further threatening and defaming communications from
25 defendant Larry List to, among other people, List Industries employees, customers, business
26 partners, vendors, and distributors. *Id.* at 3–9. The motions allege that he even sent a false lead to
27 a detective at Penn State University attempting to tie List Industries’ product to the Jerry Sandusky
28

1 scandal. *Id.* Many of these communications allegedly contained threatening and profane
2 language. *Id.*

3 One of the allegations is that on or about December 21, 2016, “Larry sent an e-mail to a
4 [List Industries] customer which alleged it could not legally sell List Industry products and
5 threatened to hold that customer ‘responsible’ for doing so.” *Id.* at 4. Another specific allegation
6 is that on May 25, 2017, “Larry sent an e-mail to fifteen (15) of List Industries’ business partners,
7 demanding that Colin List ‘resign’ and alleging that Colin List is a ‘sexual pervert’, Colin ‘verbally
8 sexually assaulted’ him, along with another List employee, J R List physically assaulted him, and
9 he had been ‘violated, harassed and ripped off’ by List Industries.” *Id.* at 5.

10 Plaintiff also cited various hyperlinks to audio files on the internet that plaintiff purports
11 represent true and correct copies of voice mail messages from Larry List. (*See, e.g.*, ECF No. 5 at
12 2). But plaintiff has not provided the court with a physical copy of these files, such as on a CD or
13 other electronic information storage device. Therefore, they are not part of the record: “Neither a
14 hyperlink nor any site to which it refers will be considered part of the official record. Hyperlinks
15 are simply convenient mechanisms for accessing material cited in a filed document. If a party
16 wishes to make any hyperlinked material part of the record, the party must attach the material as
17 an exhibit.” LR IA 7-3(c)(2). Regardless, because this court denies the instant motions on other
18 grounds, this court can assume for the purposes of these motions that the audio records contain
19 threatening, profane, defamatory messages from Larry List as plaintiff alleges.

20 **II. Legal Standard**

21 *a. The First Amendment: Prior Restraints, Overbreadth, and Vagueness*

22 “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend.
23 I. While it is true that no one “would have the hardihood to suggest that the principle of freedom
24 of speech sanctions incitement to riot,” *Carroll v. President & Comm’rs of Princess Anne*, 393
25 U.S. 175, 180 (1968) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940))—or, perhaps
26 as the plaintiff alleges here, the tortious interference with contracts—it is equally true that “[a]
27 free society prefers to punish the few who abuse rights of speech after they break the law than to
28 throttle them and all others beforehand,” *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546,

1 559 (1975). Indeed, the United States Supreme Court has declared that “prior restraints on
2 speech and publication are the most serious and the least tolerable infringement on First
3 Amendment rights.” *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976); *see also* *Tory v.*
4 *Cochran*, 544 U.S. 734 (2005).

5 “The term prior restraint is used to describe administrative and judicial orders *forbidding*
6 certain communications when issued in advance of the time that such communication are to
7 occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis in original) (internal
8 quotation marks omitted) (citation omitted). “Temporary restraining orders and permanent
9 injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of
10 prior restraints.” *Id.* A prior restraint bears a “heavy presumption against its constitutional
11 validity.” *See New York Times v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam*
12 *Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

13 The problem of prior restraints is multiplied when a court issues one before a proper trial
14 on the merits. “[A] preliminary injunction poses a danger that permanent injunctive relief does
15 not: that potentially protected speech will be enjoined prior to an adjudication on the merits of
16 the speaker’s or publisher’s First Amendment claims.” *DVD Copy Control Ass’n, Inc. v.*
17 *Bunner*, 75 P.3d 1, 21 (Cal. 2003), *as modified* (Oct. 15, 2003) (Moreno, J., concurring) (citing
18 *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973)
19 (noting that an order did not “endanger arguably protected speech” because, in part, “no interim
20 relief was granted, the order will not have gone into effect before our final determination that the
21 actions of the Pittsburgh Press were unprotected”)).

22 Another problem with preliminary injunctions and temporary restraining orders that
23 restrict speech is that a person who violates a court order risks punishment even if the order itself
24 is later deemed unconstitutional: “[A] court order must be obeyed until it is set aside, and . . .
25 persons subject to the order who disobey it may not defend against the ensuing charge of
26 criminal contempt on the ground that the order was erroneous or even unconstitutional.”
27 Stephen Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 552 (1977) (citing *United*
28 *States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972)).

1 Indeed, in *Carroll v. President and Comm'rs of Princess Anne*, the United States
2 Supreme Court declared unconstitutional a 10-day restraining order “issued ex parte, without
3 formal or informal notice to the petitioners or any effort to advise them of the proceeding.” 393
4 U.S. at 181. Likewise, in *Quantity of Copies of Books v. State of Kansas*, the supreme court held
5 unconstitutional the seizure of allegedly profane books because the court did not first afford the
6 seller of the books an adversary hearing. 378 U.S. 205, 211 (1964).

7 Further, any restriction on speech must be narrowly tailored to achieve its lawful purpose;
8 it must burden no more speech than necessary to accomplish its desired goals. *Madsen v.*
9 *Women's Health Center*, 512 U.S. 753, 765 (1994). That means an order restricting speech must
10 be “couched in the narrowest terms that will accomplish the pin-pointed objective permitted by
11 constitutional mandate and the essential needs of the public order.” *Carroll*, 393 U.S. at 183.

12 Furthermore, a law—or as here, a court order—restricting speech is unconstitutionally
13 vague if people “of common intelligence must necessarily guess at its meaning and differ as to
14 its application” *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

15 There exists a centuries-old maxim that “equity does not enjoin a libel,” which, having
16 enjoyed widespread acceptance at common law, historically has meant that the only remedy for
17 defamation or libel was an action at common law for damages. Aaron H. Caplan, *Free Speech*
18 and *Civil Harassment Orders*, 64 Hastings L.J. 781, 825 (2013) (*citing Francis v. Flinn*, 118
19 U.S. 385, 389 (1886); *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir.
20 1987); DAN B. DOBBS, 2 LAW OF REMEDIES § 7.2(14) (2d ed. 1993)). Upon the ratification of the
21 Bill of Rights, it was widely understood that the First Amendment incorporated the ban on libel
22 injunctions. *Id.* While some states have created an exception to this rule—that the law should
23 allow a *final* injunction against repeated specific falsehoods proven to be defamatory at trial—
24 most courts have rejected the exception. *Id.* The United States Supreme Court has declined to
25 squarely answer the question, and circuits and states appear to be split on the issue.¹ *Id.* This

26
27 ¹ This order takes no position on the constitutionality of final injunctions on speech after a
28 full trial on the merits. *See Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993) (“An
injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and
granted only after a final adjudication on the merits that the speech is unprotected does not
constitute an unlawful prior restraint.”); *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339

1 order need not answer this larger question now, however, as it addresses a narrower one: whether
2 the plaintiff is entitled to the specific temporary restraining order and preliminary injunction it
3 seeks, *ex parte* and before a trial on the merits, which would restrict defendant's speech.

4 ***b. Elements Required for a TRO or Preliminary Injunction***

5 Under Federal Rule of Civil Procedure 65, a court may issue a temporary restraining order
6 when the moving party provides specific facts showing that immediate and irreparable injury, loss,
7 or damage will result before the adverse party's opposition to a motion for preliminary injunction
8 can be heard. Fed. R. Civ. P. 65. "Injunctive relief is an extraordinary remedy and it will not be
9 granted absent a showing of probable success on the merits and the possibility of irreparable injury
10 should it not be granted." *Shelton v. Nat'l Collegiate Athletic Assoc.*, 539 F.2d 1197, 1199 (9th
11 Cir. 1976). "The purpose of a temporary restraining order is to preserve the status quo before a
12 preliminary injunction hearing may be held; its provisional remedial nature is designed merely to
13 prevent irreparable loss of rights prior to judgment." *Estes v. Gaston*, No. 2:12-cv-1853-JCM-
14 VCF, 2012 WL 5839490, at *2 (D. Nev. Nov. 16, 2012); *see also Sierra On-Line, Inc. v. Phoenix*
15 *Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

16 This court must consider the following elements in determining whether to issue a
17 temporary restraining order and preliminary injunction: (1) a likelihood of success on the merits;
18 (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships;
19 and (4) advancement of the public interest. *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008); *Stanley v.*

20 (Cal. 2007), *as modified* (Apr. 26, 2007) (holding that an injunction prohibiting defendant from
21 repeating speech determined by a finder of fact, after a trial on the merits, to be slanderous or
22 defamatory was not a prior restraint, but nonetheless reversing because the injunction issued was
23 overbroad); *Flint v. Smoke Burner Co.*, 19 S.W. 804, 806 (Mo. 1892) ("After verdict in favor of
24 the plaintiffs, they can have an injunction to restrain any further publication of that which the jury
25 has found to be an actionable libel or slander."); *see also DVD Copy Control Assn., Inc. v. Bunner*,
26 75 P.3d 1 (Cal. 2003) (Moreno, J., concurring) ("a preliminary injunction poses a danger that
27 permanent injunctive relief does not; that potentially protected speech will be enjoined prior to an
28 adjudication on the merits of the speaker's or publisher's First Amendment claims."); *but see Kramer v. Thompson*, 947 F.2d 666, 670 (3rd Cir. 1991) (holding that the Pennsylvania
Constitution prohibits a judge from enjoining future libelous speech, but noting that "[t]he United
States Supreme Court has held repeatedly that an injunction against speech generally will not be
considered an unconstitutional prior restraint if it is issued after a jury has determined that the
speech is not constitutionally protected"); *Kinney v. Barnes*, 443 S.W.3d 87, 94–99 (Tex. 2014)
(holding that a permanent injunction as a remedy in a defamation case is an impermissible prior
restraint on speech); *see also Tory v. Cochran*, 544 U.S. 734 (2005) (declining to answer this
question and ruling on other grounds); *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 606
(7th Cir. 2007) (same, citing *Tory*).

1 *Univ. of S. California*, 13 F.3d 1313, 1319 (9th Cir. 1994); Fed. R. Civ. P. 65 (governing both
2 temporary restraining orders and preliminary injunctions). The party seeking the injunction must
3 satisfy each element.

4 The party seeking the injunction must satisfy each element; however, “the elements of the
5 preliminary injunction test are balanced, so that a stronger showing of one element may offset a
6 weaker showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th
7 Cir. 2011). “Serious questions going to the merits and a balance of hardships that tips sharply
8 towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also
9 shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.”
10 *Id.* at 1135 (internal quotations marks omitted).

11 Finally, to obtain injunctive relief, plaintiff must show it is “under threat of suffering
12 ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not
13 conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant;
14 and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Ctr. for
15 Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (quoting *Summers v. Earth Island
16 Inst.*, 555 U.S. 488 (2009)).

17 c. *Notice and Opportunity to Be Heard*

18 “The stringent restrictions imposed by . . . Rule 65[] on the availability of ex parte
19 temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion
20 of court action taken before reasonable notice and an opportunity to be heard has been granted
21 both sides of a dispute.” *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers
22 Local No. 70 of Alameda Cty.*, 415 U.S. 423, 438–39 (1974). “Consistent with this overriding
23 concern, courts have recognized very few circumstances justifying the issuance of an ex parte
24 TRO.” *Reno Air Racing Ass'n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). Also, to
25 apply for an *ex parte* TRO, “the movant's attorney [must] certif[y] in writing any efforts made to
26 give notice and the reasons why it should not be required.” Fed. R. Civ. P. 65(b)(1)(B).

27 The first and foremost requirement for a preliminary injunction is notice: “(1) **Notice**. The
28 court may issue a preliminary injunction only on notice to the adverse party.” Fed. R. Civ. P.

1 65(a)(1). Rule 65(a)(1)'s notice requirement "necessarily requires that the party opposing the
2 preliminary injunction has the opportunity to be heard and to present evidence. . . . Moreover,
3 compliance with Rule 65(a)(1) is mandatory." *Opulent Life Church v. City of Holly Springs, Miss.*,
4 697 F.3d 279, 298 (5th Cir. 2012) (quoting *Harris Cty., Tex. V. CarMax Auto Superstores Inc.*,
5 177 F.3d 306, 325 (5th Cir. 1999); *Parker v. Ryan*, 960 F.2d 543, 544 (5th Cir. 1992)); *see also*
6 *Reno Air Racing*, 452 F.3d at 1130–32 (discussing the circumstances in which an *ex parte*
7 proceeding under Rule 65, without notice, may be appropriate). Therefore, Rule 65 "provides that
8 the court may not issue a preliminary injunction without notice and an opportunity to be heard . . .
9 . ." *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319,
10 1322 (9th Cir. 1985), *amended on other grounds*, 775 F.2d 998 (9th Cir. 1985). Thus, a motion
11 for a preliminary injunction cannot be heard and granted *ex parte*.

12 **III. Discussion**

13 *a. First Amendment: Prior Restraints, Overbreadth, and Vagueness*

14 The preliminary injunctive relief requested here cannot be granted because it would
15 constitute an unconstitutional prior restraint on speech that is both overbroad and vague.
16 Plaintiff requests an injunction forbidding the defendant from "contacting, intimidating or
17 otherwise interfering in any way with any employee, agent, representative, vendor, distributor,
18 customer and potential vendor, distributor or customer of List Industries, and any of their
19 subsidiaries, in any form or fashion, including, but not limited to, in person, by letter, e-mail,
20 text, any social media and by telephone and/or fax, for any reason, pending the outcome of this
21 action." (ECF No. 3 at 1).

22 The requested injunction would constitute a prior restraint on speech because it would
23 order the defendant to refrain from speech—on penalty of contempt—before speaking. There
24 has been no trial or adjudication of the merits of defendant's First Amendment rights, and
25 caselaw imposes the strictest possible scrutiny to injunctions restricting speech issued before
26 trial. Further, this court is aware of no binding or persuasive caselaw deeming a prior restraint
27 on speech issued by a court pretrial and *ex parte* to be constitutional.

28

1 Even if granting an injunction on speech pretrial and *ex parte* stood constitutional muster,
2 the injunction requested here would not survive the strict scrutiny such an order must endure.

3 First, the plaintiff's proposed language for the injunction is overbroad in the extreme. It
4 would prohibit plaintiff from "contacting, intimidating, threatening or otherwise interfering *in*
5 *any way with any* employee, agent, representative, vendor, distributor, customer and *potential*
6 vendor, distributor or customer of List Industries, and any of their subsidiaries, *in any form or*
7 *fashion*, including, *but not limited to*, in person, by letter, e-mail, text, any social media and by
8 telephone and/or fax, *for any reason*, pending the outcome of this action." (ECF No. 3 at 1)
9 (emphasis added). Thus, this order would prohibit defendant from "contacting," in any form or
10 fashion, for any reason, by virtually any medium of communication, virtually any person or
11 entity that may now or in the future do business with the defendant. Even if this court assumes,
12 without deciding, that the speech about which plaintiff complains in its motions is unprotected
13 by the First Amendment, this prior restraint would reach far beyond and is thus constitutionally
14 invalid as overbroad.

15 Second, the requested order is vague. For instance, the defendant might not always know
16 if an entity or person qualifies as a "potential vendor" or "customer" of List Industries. Nor will
17 he always know if his conduct is "intimidating" or otherwise generally "interfer[es]" with
18 another person or entity. *Cf. Coats v. City of Cincinnati*, 402 U.S. 611–14 (1971) (holding that
19 an ordinance was vague that prohibited people on a sidewalk from "conduct[ing] themselves in a
20 manner annoying to persons passing by" because "[c]onduct that annoys some people does not
21 annoy others").

22 Therefore, the requested injunction would be an unconstitutional prior restraint.

23 b. *Temporary Restraining Order Elements*

24 The motions also fail the four-element test for a TRO and preliminary injunction.

25 i. *Irreparable injury*

26 Plaintiff has demonstrated irreparable injury: it appears that defendant's continued
27 interactions with plaintiff's customers, vendors, and other business relationships will likely cause
28 a loss of goodwill, loss of income, and damage to plaintiff's business relationships that a money

1 judgment following a trial would not adequately redress. Defendant's emails and other
2 communications with plaintiff's customers and vendors appear on their face to be outlandish and
3 needlessly harmful to plaintiff's business.

4 However, plaintiff has failed to show that a favorable ruling on these motions would
5 redress the harm. Plaintiff admits that the Henderson Justice Court already issued a temporary
6 protective order (TPO) related to this same conduct but "was essentially unable to enforce its
7 Order or stop Larry at all." (ECF No. 3 at 4). Plaintiff admits that "List Industries has endured
8 attacks from Larry since 2012, but even proceedings in a lower court have not stopped his
9 behavior," and that "[d]espite the TPO, Larry's harassing phone calls and messages
10 continued . . ." *Id.* at 3.

11 Plaintiff claims it even contacted the FBI. However, plaintiff has not explained how this
12 court would succeed in quelling defendant's behavior where the FBI has not.

13 Finally, to the extent that plaintiff might present actual safety or security concerns—
14 which is not clear to the court from this current record—plaintiff must continue to seek aid from
15 local or federal law enforcement, not a prior restraint on defendant's speech.

16 ii. Balance of hardships

17 The balance of hardships weighs against plaintiff. On one hand, plaintiff continues to
18 suffer defendant's frequent, apparently intolerable interference with its business relationships,
19 which may be difficult—if not impossible—to repair. It seems as though plaintiff will have
20 difficulty stopping this problem from continuing. That said, plaintiff has not convinced the court
21 that the requested injunction would solve its problem.

22 On the other hand, plaintiff requests this court to issue an overbroad, vague, prior
23 restraint on defendant's speech before hearing from the defendant and before a trial on the merits
24 of whether his speech is unlawful or protected by the First Amendment. The United States
25 Supreme Court has declared that "prior restraints on speech and publication are the most serious
26 and least tolerable infringement on First Amendment rights." *Nebraska Press Assn.*, 427 U.S. at
27 559. The requested injunction would be just that.

28

1 Although plaintiff presents a sympathetic case, this court cannot rule that plaintiff's
2 hardship outweighs defendant's First Amendment rights. Thus, plaintiff has not shown that the
3 balance of hardships weighs in its favor.

4 iii. The public interest

5 The public interest here leans heavily in favor of denial of the instant motions. On one
6 hand, Nevada law protects plaintiff from defendant's intentional, unjustified interference with its
7 business dealings and alleged verbal harassment of plaintiff. Also, the public has a strong
8 interest in the plaintiff's ability to obtain a timely solution to this problem. However, an *ex parte*
9 preliminary injunction in the form of a broad, prior restraint as requested here is not the most
10 effective or desirable solution. Nor would it be constitutional. The public has an unflinching
11 interest in its freedom from prior restraints on speech, which is nothing short of a fundamental
12 freedom of American democracy. *See* U.S. Const. amend. I. Accordingly, the public interest
13 weighs heavily against issuance of the requested TRO and preliminary injunction.

14 iv. Potential for success on the merits

15 Regardless of whether plaintiff demonstrates a likelihood of success on the merits at trial,
16 the requested preliminary injunctive relief cannot issue because plaintiff has failed to show that
17 the public interest or balance of hardships weigh in its favor.

18 c. *Notice and Opportunity to Be Heard*

19 In addition to the other defects discussed by this order, this court cannot grant the
20 motions because defendant has not been heard.

21 Courts have recognized very few circumstances justifying the issuance of an *ex parte*
22 TRO. *Reno Air Racing Ass'n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). This is not
23 one of those very few circumstances justifying an *ex parte* TRO—to the contrary, this
24 circumstance heavily warrants hearing from the defendant before restricting his speech.
25 Therefore, the court will not grant the motion for a TRO *ex parte*. (ECF No. 3).

26 Further, a motion for a preliminary injunction cannot be heard *ex parte*. *People of State*
27 *of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1322 (9th Cir.
28 1985), *amended on other grounds*, 775 F.2d 998 (9th Cir. 1985); Fed. R. Civ. P. 65(a)(1).

1 Nonetheless, the plaintiff filed the instant motion for a preliminary injunction (ECF No. 4) "ex
2 parte," depriving the defendant of the opportunity to be heard on the matter. This motion must
3 also be denied. (ECF No. 4).

4 || IV. Conclusion

5 The requested injunction would constitute an unconstitutional prior restraint. Further,
6 plaintiff has failed to demonstrate multiple required elements necessary for this court's
7 extraordinary equitable intervention in the form of a TRO and preliminary injunctive relief.
8 Finally, even if the motions had merit, this court could not grant either in an *ex parte* fashion.

9 | Accordingly,

10 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for a
11 temporary restraining order (ECF No. 3) be, and the same hereby is, DENIED.

12 IT IS FURTHER ORDERED that plaintiff's motion for a preliminary injunction (ECF No.
13 4) is DENIED.

14 DATED August 30, 2017.

James C. Mahan
UNITED STATES DISTRICT JUDGE